

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

1910Z

P.L.-2  
WapiKse

FILE: B-202421

DATE: August 11, 1981

MATTER OF: HSA/Multichem

**DIGEST:**

1. Protest against selection of higher-priced offeror for chemical waste disposal contract is denied. Record does not show that contracting activity acted arbitrarily or capriciously in concluding that difference in technical merit outweighed price difference.
2. Where RFP for chemical waste disposal only requires that contractor comply with all Federal, state and local requirements concerning disposition of hazardous waste, firm's lack of incineration license (it uses interim permits) does not preclude award to that firm.
3. Objection to constitution of evaluation panel is denied where record does not indicate bias.
4. Protest against change of procurement by RFP amendment from small business set-aside to unrestricted procurement is untimely since it was not filed before proposals were due.

HSA/Multichem protests award to American Recovery Co., Inc. under request for proposals (RFP) 7-A-SEA-81 issued by the Department of Agriculture. The contract provides for the pickup, packaging, transportation, and disposal of chemical wastes from the Beltsville Agricultural Research Center in Maryland. Multichem complains that American Recovery's proposal was

OF

116075

017860

improperly selected over its substantially lower cost proposal; contends that American Recovery does not meet all applicable licensing requirements; objects to the composition of the agency's selection panel; and argues that it was not told that the agency deleted the total small business set-aside restriction to allow American Recovery to compete.

The protest is denied in part and dismissed in part.

Concerning Multichem's complaint that American Recovery's proposal was selected over its offer, the solicitation provided that proposals would be evaluated on the basis of seven principal criteria. Offerors were advised that these criteria, along with their relative weights, were as follows:

<u>Factor</u>	<u>Numerical Value</u>
Price	25
Understanding of Requirements	25
Operating Methods	25
Contingency Plan	10
Operational and Financial Responsibility	5
Key Personnel	5
Health and Safety	5

Multichem's price was approximately half that proposed by American Recovery. Using an inversely proportional scoring system (25 available points times the ratio of lowest offered price to each offeror's price), the agency assigned 25 points to Multichem for price and 13 points to American Recovery. American Recovery received a combined score of 62 for all criteria other than price, compared with 44.75 points for Multichem, giving the awardee an overall 75 to 69.75 point advantage.

Multichem says it should have received as high a technical score as American Recovery because, while American Recovery is larger, Multichem competes with it by offering

better service and by using more efficient disposal methods. Multichem focuses on a number of specific complaints which it believes illustrate what it views as favoritism toward American Recovery, the incumbent.

Multichem says it was criticized for having only two small trucks but points out that American Recovery listed two trucks of the same size in its proposal. The protester also believes it was unfairly penalized as having inadequate disposal facilities and asserts that both it and American Recovery use single on-site incinerators and that its incinerator is larger than American Recovery's incinerator. Multichem insists that the size of its facilities (which it admits are much smaller in total area than are American Recovery's facilities) was improperly singled out as a weakness because it processes materials rapidly, making extensive on-site storage of chemicals unnecessary, and because it does a smaller amount of business than does American Recovery.

Further, Multichem says the Government criticized it improperly for failing to furnish sufficient detail regarding its handling of chemicals, since Government representatives could have examined its 300-page Designated Hazardous Substance (DHS) Contingency Plan during an on-site survey conducted at its facility but did not take advantage of this opportunity.

Finally, Multichem says: (1) that the security of its facility was improperly questioned, since it and American Recovery share a common fence, (2) that the Government improperly faulted it for listing only one person with hazardous chemical experience notwithstanding that American Recovery also listed only one such person, and (3) that contrary to the Government's belief it did (but American Recovery did not) discuss in its proposal actions to be taken in the event of health problems.

The record shows that Multichem's proposal was not scored low due to any one specific weakness, but because the technical committee concluded that the proposal deserved a relatively low score in a number of the RFP evaluation areas.

With regard to Multichem's understanding of the Government's requirements, the evaluators expressed concern with both the size of Mutichem's facilities and the lack of detail in the proposal. The committee noted that the Multichem facility consisted simply of a low security platform housing an office trailer and incinerator, and one 1400 square foot building to store chemicals. Although the committee found that Multichem was knowledgeable with respect to how information regarding safety could be obtained, and that Mutichem recognized the importance of experience to plant security, it downgraded Mutichem's score because the responses given in its proposal were limited to generalizations and lacked specificity. Further, the committee concluded that Multichem did not provide adequate detail regarding listed alternative disposal facilities which might be used, leaving the committee uncertain as to where Government waste chemicals would be before they were finally disposed of or recycled.

The committee expressed similar concerns with respect to those parts of Multichem's proposal which described its operating methods. Agriculture says, in this regard, that Multichem furnished only a brief description of its spill plan and listed but did not explain in any detail five different disposal methods and eight different limitations on selection of a disposal method. While the committee found that the proposed methods and limitations were acceptable, it did not believe the proposal merited a high score in view of the Government's concern with the safety and security of Government waste chemicals.

The committee also believed Multichem's proposal reflected insufficient concern with the need for alternate disposal sites (even though Multichem listed two sites as required), since the Government expected a fuller discussion of the problem. The committee did not believe that Multichem's financial and licensing statement and its list of firms for which it does work merited credit equal to that given other offerors, and it did not think Multichem's staff, which the proposal indicated included only one person with a background in hazardous chemicals (other Multichem employees were experienced in chemistry), equaled that of its competitors. Nor did the committee believe Multichem provided sufficient detail regarding health monitoring of its employees.

The relative desirability of technical proposals is a matter of judgment within the discretion of the contracting agency which will not be questioned by our Office absent a clear showing that the contracting agency acted arbitrarily or capriciously. Rolair Systems, Inc., B-193405, November 9, 1979, 79-2 CPD 345. Moreover, the burden of proving Multichem's case, i.e., the burden of establishing that the evaluation of the firm's proposal was arbitrary or capricious, falls on the protester. See Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Without discussing in detail all of the separate points raised by Multichem, it is evident from our discussion that the protester received a lower score for the technical aspects of its proposal than did American Recovery essentially for two reasons.

First, the scope of Multichem's operations and the extent of its facilities are limited. While Multichem views this as having certain advantages, because as a result it must dispose of waste quickly, the agency's evaluators nevertheless were concerned that difficulty might be encountered. They therefore focused their attention on Multichem's planning and resources (plant space, incinerator and number of trucks), the importance of which, in dealing with possible contingencies, were magnified because available space to temporarily store waste at Multichem's facilities was limited.

Second, Multichem provided only a brief description of its plan for handling potential problems including possible chemical spills and security, alternate waste disposal plans, and contingency plans for action to deal with problems affecting the health of employees. Major areas of its proposal were presented only in outline form. While Multichem doubtless thought its presentation was adequate, it plainly failed to satisfy the evaluators' concerns.

With regard to Multichem's belief that the Government should have given greater weight to the contents of its DHS Contingency Plan, a copy of that plan was not submitted by Multichem with its proposal. In effect,

Multichem is arguing that the Government must give consideration to documents which it observes or could have observed (and requested) during a site survey, at least where, as here, the survey occurs before best and final offers.

We do not agree with Multichem's view. We have long held that it is incumbent upon each offeror to establish that what it proposes will meet the Government's needs. See Duroyd Manufacturing Company, Inc., B-195762, November 16, 1979, 79-2 CPD 359. Had Multichem wanted to assure that the DHS Contingency Plan was considered by the Government it should have submitted the plan as part of its initial proposal, or included it with other information that it submitted in response to the agency's later requests for clarifying data and best and final offers.

Moreover, because the DHS Contingency Plan was never submitted to the contracting activity, it was not furnished by that agency to our Office as part of its report on this protest. Multichem has not submitted a copy of the plan to our Office. Our decision in this case must be based on the record before us; we have no basis from which we could conclude that the DHS Contingency Plan would have enhanced Multichem's technical score even if the agency had examined it. See Interscience Systems, Inc., B-197000.2, October 27, 1980, 80-2 CPD 320.

Award to a firm other than the one that submitted the lowest price proposal is not improper where technical merit outweighs the difference in price and the importance of technical considerations is indicated in the solicitation evaluation criteria. Fortec Constructors, B-188770, August 7, 1979, 79-2 CPD 89. In this instance, the RFP indicated that factors other than price would make up three-quarters of an offeror's total score; Multichem could not overcome this relative difference in importance between technical and price considerations because Multichem's technical proposal was only minimally acceptable even though it received all 25 points for price. In our view, Multichem has not shown that the evaluation of its technical proposal was arbitrary or capricious. The protest on this issue is denied.

Multichem also suggests that American Recovery is nonresponsible because its proposal indicated it would use incineration to dispose of certain kinds of materials, but did not list an incineration license. Instead, the firm's proposal indicated that American Recovery operates using interim permits.

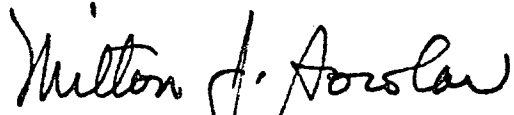
The solicitation, however, only stated that the contractor must comply with all applicable Federal, state and local requirements concerning the disposal of hazardous waste. We have consistently viewed that type of provision as a general licensing requirement which merely places the responsibility for obtaining any licenses and permits that may be needed during performance on the contractor. See What-Mac Contractors, Inc., 58 Comp. Gen. 767, 771 (1979), 79-2 CPD 179. A firm's failure to obtain a license where a solicitation includes only a general licensing requirement is a matter to be resolved between the firm and the licensing authority. Career Consultants, Inc., B-195913, March 25, 1980, 80-1 CPD 215. Thus, the fact that American Recovery may not have an incineration license would not preclude award to that firm. See B&W Stat Laboratory, Inc., B-195391, March 10, 1980, 80-1 CPD 184.

Regarding Multichem's complaint that the evaluation panel was unqualified because three of the four members were not chemists, we have held that the selection of an evaluation panel is a matter falling primarily within the discretion of the procuring activity, which our Office will not question absent evidence of actual bias. Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176. The three members of the panel included the Utilities and Services Branch Chief at Beltsville, the Safety and Health Manager, and an industrial hygienist -- personnel whose responsibilities or backgrounds were related to the administration or subject matter of the contract. We have no basis to question their selection.

Finally, Multichem complains that it was not advised that the procurement was changed from a total small business set-aside to an unrestricted procurement. Multichem suggests that this action was taken to permit American Recovery, which Multichem says is a large business, to receive award.

The set-aside, however, was deleted by an amendment issued prior to the closing date for receipt of initial proposals, and Multichem acknowledged receipt of that amendment in its proposal. Accordingly, the contention that the firm did not know of the change is without merit. Since the firm did not complain about the matter before proposals were due, the issue is not timely under our Bid Protest Procedures and will not be considered on the merits. 4 C.F.R. § 21.2(b)(1) (1981).

The protest is denied in part and dismissed in part.

A handwritten signature in dark ink, reading "Milton J. Aroslan". The signature is written in a cursive, flowing style with a large initial "M".

Acting Comptroller General  
of the United States